



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 516 OF 2012

CHABRIN AGENCIES LIMITED 1ST APPELLANT

STEPHEN MWANGI KINUTHIA 2ND APPELLANT

V E R S U S

URBANUS MAKAU NGWILI1ST RESPONDENT

ATTORNEY GENERAL OF KENYA..... 2ND RESPONDENT

P. C. FRANCIS NJOROGE 3RD RESPONDENT

(An appeal against the judgement dated 2nd Mach 2012 and decree issued on 5th April 2012 by Senior Principal Magistrate Mr. S. A. Okato arising from Civil suit no. 2380 at Milimani Commercial Courts)

JUDGEMENT

1. Urbanus Makau Ngwili, the 1st respondent herein, filed an action before the chief magistrate's court, Nairobi against Attorney General, Chabrin agencies Ltd, P. C. Francis Njoroge and Stephen Mwangi Kinuthia, the 2nd respondent, the 1st appellant, the 3rd respondent and 2nd appellant respectively vide the plaint dated 23rd April 2008. In the aforesaid plaint, the 1st respondent sought for judgement in the following terms:

- i. **General damages for malicious prosecution, wrongful arrest and false imprisonment**
- ii. **Special damages ksh.200,000/=**
- iii. **Costs of this suit**
- iv. **Interest**

2. The defendants filed their respective defences before the trial court to deny the plaintiff's claim. Hon. S. S. Okato, learned Senior Principal Magistrate heard the case and on 2nd March 2012, he entered judgement in favour of the 1st, 2nd respondent against the appellants jointly and severally in the sum of kshs.700,000/= with costs and interest. Being dissatisfied, the 1st and 2nd appellants preferred this appeal.

3. On appeal, the appellants put forward the following grounds:

1. ***The Learned Senior Principal Magistrate erred in law by not complying with the mandatory provisions of Order 21 of the civil procedure rules 2010 in writing the judgment for failure among other issues to contain the points for determination and concise statement of the case.***

2. ***The Learned Senior Principal Magistrate erred in law by not complying with the mandatory provisions of order 21 rule 7(1) of the civil procedure rules 2010 by issuing a decree that did not specify clearly the relief granted.***
3. ***The Learned Senior Principal Magistrate erred in law and fact in not considering the defendants, submissions and authorities submitted in court which are binding upon the lower court, while making his judgement.***
4. ***The Learned Senior Principal Magistrate erred in fact by finding that there was malice on the part of the appellant when indeed the respondent did not adduce evidence to prove malice.***
5. ***The Learned Senior Principal Magistrate erred in law and in fact by imputing malice on the grounds that the prosecution occasioned many adjournments in criminal case no. 14081 of 2004 Republic Vs Urbanus Makau Ngwili at Makadarra Law Courts, whereas the defence in that matter had occasioned many adjournment as well.***
6. ***The Learned Senior Principal Magistrate erred in law in awarding excessive damages against courts authorities and the weight of evidence.***

4. Learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. In ground 1, the appellants have argued that the trial magistrate did not comply with the provisions of Order 21 rule 4 of the Civil Procedure Rules, 2010 when writing the judgement. It is said that the judgment does not contain the points for determination. The respondents are of the view that the appellants misapprehended the judgement since the same conforms with the provisions of Order 21 rule 4 of the Civil Procedure Rules. I have on my part perused the judgement of the trial court. It is apparent from pages 20 to 23 of the Record of Appeal that the learned Senior Principal Magistrate set out concise statement of the case and points for determination. I therefore find the 1st ground to be without merit.

5. In ground 2, the appellant has complained that the decree simply indicates the sum of kshs,700,000/= as the principal sum without giving the breakdown of how that figure was arrived at. The appellant further argued that Order 21 rule 7 of the Civil Procedure Rules, 2010 requires in mandatory terms that a decree should specify the relief granted. According to the appellants, the learned Senior Principal Magistrate when he failed to comply with the aforesaid provisions. The respondents are of the view that the decree as drawn conforms with the provisions of Order 21 rule 7(1) of the Civil Procedure Rules since it specified the relief granted. I have perused the judgement and the decree extracted herein. The judgement clearly specifies the kind of reliefs sought and granted. The relief sought is for general damages. The learned Senior Principal Magistrate awarded a global sum of ksh,700,000/= representing damages. With respect I agree with the submission of Mr. Nyakinangina, learned advocate for the respondents that it is not the duty of the trial magistrate to extract the decree. That is the duty of the executive officer who must ensure that the decree is in agreement with the judgment. I find no merit on this ground.

6. In ground 3, the appellants aver that the trial magistrate failed to consider the appellant's submissions. It is argued that had the appellant's submissions and authorities been considered, the 1st respondent's case would have been dismissed. The respondents pointed out that in page 24 of the record of appeal in which the trial magistrate specifically stated that he considered the rival submissions and authorities. I have on my part perused the judgment and it is clear to me that the learned Senior Principal Magistrate specifically stated that he took into account the rival submissions and authorities at page 24 of the record of appeal. The trial magistrate cannot therefore be faulted. I find no merit in ground 3.

7. The appellants chose to argue grounds 4 and 6 together. It is argued that the 1st respondent did not prove his case to the required standards in civil cases. The appellants argued that the 1st respondent failed to tender evidence to establish malice. The appellants stated that they presented witnesses DW1 and DW2 to show that the 1st respondent received cash from tenants on behalf of the 1st appellant. It was also pointed out that the 1st respondent had receipt books which he issued upon receiving payments. It is stated that it was clear that the 1st respondent was therefore in a

position to receive and handle money in the course of his employment with the 1st appellant. It was pointed out that the appellant tendered evidence showing that the 1st respondent was to report back to work on 28.12.2003 but he failed to do so. Based on the fact that the 1st respondent had not returned receipt books which he had used to collect payments of rent on behalf of the 1st appellant and that he failed to report back to work, the 1st appellant was prompted to put up posters to inform tenants that the 1st respondent was no longer allowed to collect rent payments. The appellants saw no malice.

8. The 1st respondent was of the view he tendered evidence establishing malice on the part of the appellants. It is said that the appellants maliciously put up posters in the neighbourhood of the 1st respondent. The 1st respondent further argued that malice can be inferred from the appellants conduct of failing to pay him his dues yet he was not formally terminated. The learned Senior Principal magistrate considered the evidence tendered and came to the conclusion that the 1st respondent's prosecution was actuated by malice. The 1st respondent was taken to court on an allegation that he misappropriated ksh.363,400 an amount belonging to the 1st appellant. The charge was eventually withdrawn on 27.6.2007 under section 87(a) of the Criminal Procedure Code because there were no witnesses in court and the police file was not in court. On my part I have re-evaluated the case that was before the trial court. There is no doubt that a report was made to the police. Documents were submitted to the police which documents to date are still with the police. The 1st respondent in his testimony admitted that he was informed of the reasons why he was being arrested. It is alleged he had failed to submit money he received on behalf of the 1st appellant. In my view I am satisfied that there was probable and credible reason to cause the arrest and subsequent prosecution of the 1st respondent. In my humble view, the learned Senior Principal Magistrate erred when he found the appellants liable for malicious prosecution. In the circumstances therefore the 1st respondent was not entitled to an award of damages.

9. In the end the appeal is allowed. The order entering judgement is set aside and is substituted with an order to dismiss the suit.

10. The appellants to have costs of the suit and the appeal.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent